

INDEX

SUBJECT INDEX

| | |
|---|-----------|
| Statement as to jurisdiction | Page 1 |
| Opinions below | 1 |
| Jurisdiction | 2 |
| The federal questions presented, and the manner in which they were raised | 3 |
| Statute involved | 4 |
| Statement | 5 |
| The questions presented are substantial | 10 |
| Historical background | 12 |
| The Nashville case | 15 |
| The action of the Commission | 17 |
| The present position of the Railroads | 21 |
| Recent informed approach to the problem | 25 |
| The importance of this appeal | 28 |
| Conclusion | 30 |
| Appendix "A"—Original opinion and order of the Public Utilities Commission of California | 32 |
| Appendix "B"—Opinion and order of the Public Utilities Commission of California denying re- hearing | 46 |

TABLE OF CASES CITED

| | |
|--|----|
| <i>Alta Overpass</i> , 38 Cal. R.C. Reports 606 | 18 |
| <i>Atchison, Topeka & Santa Fe Railway Co. v. Public Utilities Commission of California, et al.</i> (No. 667, October Term, 1952) | 10 |
| <i>El Monte Underpass</i> , 38 Cal. R.C. Reports 612 | 18 |
| <i>Erie R. Co. v. Board of Public Utility Commissioners</i> , 254 U.S. 394 | 13 |
| <i>Ex Parte</i> 168, 276 I.C.C. 9 | 27 |
| <i>Ex Parte</i> 175, 284 I.C.C. 589 | 27 |
| <i>Goshen Junction Separation</i> , 38 Cal. R.C. Reports 380 | 11 |
| <i>Hamilton v. Regents</i> , 293 U.S. 245 | 2 |
| <i>King v. U.S.</i> , 344 U.S. 254 | 27 |

| | |
|---|----|
| <i>Lake Erie & Western R. Co. v. Public Utilities Commission</i> , 249 U.S. 422 | 2 |
| <i>Live Oak Water Users Assn. v. Railroad Commission of California</i> , 269 U.S. 354 | 2 |
| <i>Los Angeles Application</i> , 37 Cal. R.C. Reports 784 | 17 |
| <i>Madrone Underpass</i> , 38 Cal. R.C. Reports 425 | 18 |
| <i>Missouri Pacific R. Co. v. Omaha</i> , 235 U.S. 121 | 13 |
| <i>Napa Valley Electric Co. v. Railroad Commission of California</i> , 251 U.S. 366 | 4 |
| <i>Nashville C. & St. L. R. Co. v. Walters</i> , 294 U.S. 405 | 8 |
| <i>Northern Pacific R. Co. v. Duluth</i> , 208 U.S. 583 | 13 |
| <i>Pacific Intermountain Express Co.—Control and Purchase</i> , 57 M.C.C. 341 | 23 |
| <i>San Bernardino Application</i> , 37 Cal. R.C. Reports 506 | 17 |
| <i>Southern Pacific Co. v. Public Utilities Commission of California</i> , 51 Cal. P.U.C. Reports 788 | 2 |

STATUTES AND OTHER AUTHORITIES

| | |
|---|----|
| Constitution of the United States, 14th Amendment | 3 |
| "Danger or Delay" Milner, 35 National Safety News (May 1937) 11, 12 | 26 |
| Federal Aid Highway Act of 1944, 58 Stats. 838 | 26 |
| Highway Safety Investigation, 1950, 50 Cal. P.U.C. Reports 29 | 29 |
| National Transportation Policy, 58 Stats. 899 | 27 |
| Railway-Highway Grade Crossing Problem (The Stanford University Press, 1952) | 25 |
| Report of Special Committee of National Association of Railroad and Utilities Commissioners, dated November 11, 1952, p. 66 | 23 |
| 45th Annual Report of the Interstate Commerce Commission (1931) p. 98 | 16 |
| 52nd Annual Report of the Interstate Commerce Commission (1938) p. 17 | 16 |
| 65th Annual Report of the Interstate Commerce Commission p. 20 | 23 |
| Senate Report No. 1039, 82nd Cong. 1st Sess. 46 (1951) | 27 |
| United States Code, Title 28, Section 1257(2) | 2 |

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 739

SOUTHERN PACIFIC COMPANY, a corporation,
Appellant,

vs.

**PUBLIC UTILITIES COMMISSION OF THE STATE
OF CALIFORNIA and R. E. MITTELSTAEDT, JUS-
TUS F. CRAEMER, HAROLD P. HULS, KENNETH
POTTER and PETER E. MITCHELL, as members of
and constituting said Commission,**

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, appellant submits herewith its statement particularly disclosing the basis upon which this Court has jurisdiction on appeal to review the judgment of the Supreme Court of California in this cause.

Opinions Below

The Supreme Court of California entered a final order in this cause, but wrote no opinion. The original opinion

and order rendered herein by the Public Utilities Commission¹ of California, identified as its Decision No. 47420, are reported at 51 Cal. P.U.C. Reports 788, and are reproduced as Appendix A to this statement. The Commission's opinion and order denying rehearing (identified as its Decision No. 47597) are not reported; a copy thereof is attached as Appendix B.

Jurisdiction

The final judgment of the Supreme Court of California in this cause was entered on March 9, 1953. A petition for appeal was presented to the Chief Justice of said Court on March 23, 1953. The jurisdiction of the Supreme Court to review this judgment by appeal is conferred by Title 28, United States Code, Section 1257(2).

The State action, the validity of which is sought to be determined by this appeal, is contained in the decisions of the Commission above referred to, which among other things direct and require appellant to bear one-half of the total cost of the construction of a grade separation to be built at the point where petitioner's main line of railroad crosses Los Feliz Road (Boulevard), a public street and highway in the Cities of Los Angeles and Glendale, California. This Court has held that; "Such an order, being legislative in nature and made by an instrumentality of the State, is a State law within the meaning of the Constitution of the United States and the laws of Congress regulating our jurisdiction."

Lake Erie & Western R. Co. v. Public Utilities Commission, 249 U. S. 422, 424 (1919);

Live Oak Water Users Assn. v. Railroad Commission of California, 269 U.S. 354, 356 (1926);

Hamilton v. Regents, 293 U.S. 245, 258 (1934).

¹ Hereinafter, for brevity, generally referred to as "the Commission".

The Federal Questions Presented, and the Manner in Which They Were Raised

The essential questions presented on this appeal are whether, in the light of the Due-Process and Equal-Protection Clauses of the Fourteenth Amendment to, and the Commerce Clause of, the Constitution of the United States, a State regulatory tribunal purporting to act under authority of a State law may validly order the appellant, an interstate railroad carrier, to pay and bear an amount and proportion (in the case at bar, one-half of an estimated total of \$1,493,200) of the cost of construction of a railroad-highway grade separation: where (1) the amount thus ordered to be borne by appellant is admitted to be wholly unrelated to, and greatly in excess of, the value of the benefits which appellant will receive therefrom; (2) the separation is not required for reasons of safety, and in fact no safety claim is seriously asserted; (3) the only substantial reason urged, or found to exist, in justification of said construction is that it will provide for and permit the rapid and uninterrupted movement of a large and increasing volume of motor-vehicle traffic, which presently experiences delay and interference whenever a train or engine moves over the existing grade crossing; and (4) the allocation of the construction cost to the parties in interest, particularly appellant, is not responsive to or supported by any evidence, but on the contrary is in effect conceded to be a purely arbitrary assessment.

In its petition for writ of review addressed to the Supreme Court of California, the highest court of the State, and the only court thereof having jurisdiction to review orders of the Commission, appellant contended specifically, and in detail, that the Commission's orders violate the Commerce Clause, and the Due-process and Equal-protection

Clauses of the Fourteenth Amendment, in the respects and for the reasons above summarized.²

The same essential contentions were duly raised and presented by appellant in the proceedings before the Commission in which the decisions under challenge were rendered, and thereafter in briefs filed with that Commission, both prior to the initial decision, and in support of a petition for rehearing filed by appellant with the Commission.

The federal questions have thus been raised and urged at every opportunity, and at all stages of the proceedings leading up to the final action by the Supreme Court of California, embodied in the judgment and order from which this appeal is taken. That Court's final action consisted of an order, rendered without opinion, two justices dissenting, by which appellant's petition for writ of review was denied. A copy of the order is attached as Appendix C. That order constituted a judgment on the merits, upholding the Commission's decisions against appellant's claim of invalidity based upon the Federal Constitution.

Napa Valley Electric Co. v. Railroad Commission of California, 251 U.S. 366, 372-373 (1920).

Statute Involved

The statute involved, as that term has been defined by this Court, consists of Decision No. 47420 of the Public Utilities Commission of California, entered in this cause on June 30, 1952 (Appendix A), and its Decision No. 47597, denying rehearing, entered herein on August 19, 1952 (Appendix B).

These orders have repeatedly been asserted by the Commission itself to have been legislative in character, i.e., an

² Appellant's contention that the Commission's orders are invalid because in conflict with the provisions of the Federal Constitution were set out in full, in Part IV of its Petition for Writ of Review (pages 7-9).

exercise of the police power, pursuant to legislative delegation. Compare Dec. No. 47420, 51 P.U.C. Reports, at p. 795: Appendix A, *infra*.

Statement

Appellant, Southern Pacific Company, is an interstate common carrier by railroad. The lines which comprise its system are located in nine of the western and southwestern states: extending from New Orleans, Louisiana, across Texas, New Mexico, and Arizona, to Los Angeles, California, and thence by two main routes along the Pacific Coast to San Francisco, and to Portland, Oregon; and including also a line extending from San Francisco, across California and Nevada, to Ogden, Utah. The total road mileage of the system is more than 12,400.

Ever since the year 1874 appellant has maintained and operated a railroad line between Los Angeles and San Francisco. At a point adjacent to the present boundary between the Cities of Los Angeles and Glendale this line, which is built on a private right-of-way acquired in 1873, crosses a street now known as Los Feliz Road (Boulevard). This street was first opened across the railroad some time after 1887. At all times the crossing over the railroad tracks has been at grade; for many years continuous (24-hour) protection against collisions between vehicles on the roadway, and trains or engines on the railroad, has been afforded by crossing gates, operated by employees of appellant.

For at least 30 years, Los Feliz has been an important major highway artery, providing a direct through route between heavily populated areas of Los Angeles County, and connecting directly with various major interstate highways, notably U. S. Highways 99 and 66. A traffic count at the Los Feliz crossing, taken in 1925, and referred to in

the Commission's Decision No. 17330 (28 Cal. R.C. Reports 516, 520), showed that on a typical day in that year 14,205 vehicles passed over the Los Feliz crossing in the 16-hour period, 6:00 A.M. to 10:00 P.M. Since 1925, the roadway has been widened and improved so that now there are six traffic lanes; and the number of vehicles using the crossing is about 27,000 per day. In contrast, however, the number and frequency of train movements over the crossing do not appear to have increased materially in recent years. Switching movements over the crossing are generally at night, and do not interfere substantially with the highway traffic. Through freight and passenger trains rarely, if ever, stop so as to block the crossing. On the average weekday, the crossing gates are lowered for train and engine movements about 70 times in the 24 hours; on Sundays, about 60 times.

The traffic counts also disclose that trucks (not including light-panel trucks) and buses use the crossing in substantial numbers, especially on weekdays. The average number of such trucks per weekday was 1105 in 1951; the average number of buses, 193.

Recognizing the importance of Los Feliz as a through highway, proceedings were instituted in 1925 before the Commission looking to the construction of a separation. The Commission, after hearing, rendered its Decision No. 17330, above referred to, approving and authorizing such construction. That decision shows that it was then estimated that the separation would cost \$421,790.

The authority thus granted was never exercised because (as stated by the Commission in Decision No. 47420, 51 Cal. P.U.C. Reports, at p. 790, Appendix A, *infra*) the parties later requested dismissal of the proceedings, alleging that finances were not available for the construction.

By 1951, the volume of traffic over the Los Feliz crossing had greatly increased, i.e., had practically doubled, as shown

above. The delays to and interferences with such traffic, and with similar traffic moving through the nearby intersection of Los Feliz with San Fernando Road (U. S. Highway 99), occurring when the crossing gates at Los Feliz were lowered, had become correspondingly serious. The City of Glendale therefore applied (May 7, 1951) to the Commission for an order authorizing construction of the separation, and apportionment of the cost. The formal application asserted that the separation was required for the following purposes:

- “(a) To permit Los Feliz to carry its normal traffic without the delays caused by the passage of trains;
- (b) To prevent traffic congestion and the blocking of traffic on San Fernando Road, a State highway; and
- (c) To permit the public to receive and enjoy the full benefit of its present large investment in the traffic facilities afforded by the present improvements on Los Feliz.”

It will be noted that the purposes thus specified did not include any reference to safety, or the prevention of accidents at the crossing.

Subsequently the Commission instituted its own investigation of the question whether the separation should be built. The City's application and the Commission's investigation were consolidated for purposes of hearing and decision. After receiving evidence, and considering briefs filed by certain of the parties in interest, the Commission rendered its Decision No. 47420 (Appendix A, *infra*). In that decision, the Commission reviewed the evidence in considerable detail, and noted, among other things: (1) that the testimony of a witness for the applicant was to the effect that the proposed grade separation was of utmost importance, due to the heavy population of the area, and to the daily flow of vehicles and trains at the intersection;

and (2) that a cooperative study had been made (the results of which were specially set forth), developing the monetary values of the principal benefits accruing from the separation. The Commission concluded and found that the construction was in the interest of public safety, convenience, and necessity, and would be practicable; and further, that the proposed construction did not concern a state highway.

As to the allocation of costs, appellant had contended that the Commission should be guided by the "benefit principle", as stated in this Court's opinion in a very similar case: *Nashville, C. & St. L. R. Co. v. Walters*, 294 U.S. 405, 430 (1935): "So-called assessments for public improvements, laid upon particular property owners, are ordinarily constitutional only if based on benefits received by them."

The Commission held, however, that it was not "bound to follow the so-called 'benefits' theory"; and referred to and affirmed its holding in its then recent Decision No. 47344 (51 Cal. P.U.C. Reports 771).³

In that decision, which involved the proposed reconstruction and widening of certain underpasses where the lines of the Santa Fe cross Washington Boulevard in the City of Los Angeles, the Commission had taken specific note of the railroad's reliance upon this Court's decision in the *Nashville* case. The Commission had refused to follow that decision, holding instead (51 Cal. P.U.C. Reports, at p. 781) that "under the exercise of the police power" it might apportion the costs of a grade separation "in the exercise of its sound discretion".

Having thus concluded in the present case, as in its Decision No. 47344 in the *Santa Fe* case, that in the exercise of the police power its discretion was completely unhampered

³ The allocation of cost made by the Commission in Decision No. 47344, having been sustained by the Supreme Court of California through denial of a petition for a writ of review, is now being challenged by an appeal to this Court, on behalf of the railroad there involved, the Atchison, Topeka and Santa Fe.

by any constitutional limitations, the Commission made no attempt at all to justify the 50-percent allocation to appellant by reference to either the evidence before it, or any ascertainable standard. While the Commission did include in its opinion a comment to the effect that the Los Felix separation would obviously be of benefit to the railroad, and in this connection referred to testimony of both its own Transportation Engineer, and an engineering witness called by appellant, there was not and never has been, at any stage of the case, any pretense or suggestion that the allocation was based thereon. This very testimony, which in fact is reproduced in part elsewhere in the opinion (51 Cal. P.U.C. Reports, at pp. 793, 794), demonstrated that the value of the benefits accruing to appellant was less than one-sixth of the actual assessment laid upon it (\$118,340, as compared to \$743,600). Thus it is apparent, on the face of the decision, that the allocation is entirely arbitrary, and not in any sense a reasoned and conscientious effort to exercise an informed judgment based upon benefits, or a reflection of any other definite standard or principle. The Commission has never advanced any contrary contention. Instead, it has taken the firm position that this allocation is an exercise of the police power of the State, and asserted that that reason is completely sufficient to support its refusal to be guided by the testimony showing the benefits to the railroad, or to allocate the costs of the construction on that basis.

Upon denial by the Commission of appellant's petition for rehearing (Decision No. 47597; Appendix B, *infra*), appellant filed a petition for writ of review in the Supreme Court of California, supporting that petition by a detailed memorandum of points and authorities, with an appendix in which the essential facts bearing upon the issues presented by the petition were set forth. On March 9, 1953, that Court entered its order (Appendix C, *infra*) denying the petition,

two justices dissenting; following which this appeal was duly taken to this Court.

The Questions Presented are Substantial

As already indicated, this case is a companion to "*Atchison, Topeka and Santa Fe Railway Co. v. Public Utilities Commission of California, et al.*", now pending in this Court. In that case the Santa Fe, as appellant, has challenged the Commission's Decision No. 47344, in which the Commission has undertaken to require the railroad to bear one-half of the cost of reconstructing the Washington Boulevard grade separations in the City of Los Angeles. The basic contentions advanced by the railroads in these two cases have been and are essentially the same. The Commission's action in the *Santa Fe* case was cited and affirmed, by the Commission, in its Decision No. 47420 in the case at bar. While the immediate fact situations in the two cases present some incidental differences, the broad background, and consequently the controlling considerations, are virtually identical.

As stated in the appellant's Jurisdictional Statement in the *Santa Fe* case, the circumstances presented in these cases are not unique or even unusual. There have been many proceedings involving railroad-highway grade separations, in which the principal, if not the sole, contested issue had to do with the apportionment of the costs, as between the railroad and the other interests involved, ordinarily the state or local public authorities proposing the separation. With the continuing substantial increase in the volume of automotive traffic, especially the larger-sized commercial vehicles handling inter-city movements, it is to be expected that more and more demands will be made for the separation of rail-highway crossings, so as to forestall

or do away with grade-crossing delays; and many more of these cases will arise.

Thus the question of the proper standards to be observed in allocating construction costs presents a constitutional issue of outstanding public importance: for no matter how urgent the demand, the actual determination whether in a given situation a separation shall be built invariably depends, in the last analysis, upon the availability of funds and thus, in turn, upon the contributions which can be exacted, under persuasion or compulsion, from the various interests involved.

These two cases are, however, unique and distinctive in at least one respect: the Commission's abrupt and largely unexplained refusal to be guided, in its asserted exercise of the police power, by the constitutional principles so clearly stated by this Court in the *Nashville* case, *supra*, and there applied to reverse a decree approving an arbitrary imposition of grade-separation costs upon the railroad, of the same degree and character as in the case at bar. This feature of the present cases is the more marked because the Commission, more than 20 years ago (Decision No. 25551, *Goshen Junction Separation*, 38 Cal. R.C. Reports 380, January 16, 1933) formally adopted the benefit principle, in effect anticipating by two years this Court's pronouncement in the *Nashville* case. The Commission thereafter steadfastly followed and applied that principle for more than 18 years (i.e., until its first decision in the *Santa Fe* case). During that period this appellant and its system lines in California were parties to more than 100 grade separations within the State. In each of these cases the costs were apportioned, generally by agreement, but uniformly on the basis of benefits; and in each such case the apportionment, as well as the other features of

the construction, were approved by formal order of the Commission.

1. The Historical Background:

When the railroads were first built in the United States, grade crossings were unavoidable, principally because of financial considerations. Funds simply could not have been obtained to have built the railroads at all, if from the outset the costs of actual construction had been augmented because of mandatory requirements that all road crossings be separated. Consequently, and for many years, grade crossings were accepted as a necessary incident of the existence and growth of the rail transportation system; so that in the earlier stages of railroad construction and expansion, and for some time thereafter, there was little agitation for grade separations.

This was due in large part to the fact that in that earlier period there were few, if any, through highways used for inter-city transportation. Traffic on the roads was almost entirely horse-drawn, and predominantly local in character. Through inter-city transportation was carried on principally by the railroads, supplemented to some extent by canal and river boats, and coastwise shipping. Consequently the interferences with highway vehicles, incident to the movement of trains and engines over grade crossings, were of little consequence except in the larger cities. As rail traffic increased in volume and frequency, with the growth of population and industry, and especially when railroad trains became faster as well as heavier and more frequent, the hazards at grade crossings became more substantial; so that when separations were demanded, the primary reason urged and recognized was the elimination of this hazard.

Even though the demand for a particular grade separation might be well justified, there was still to be deter-

mined the question of the allocation of the expense of its construction. On the one hand, there was the railroad, enjoying at the time a virtual monopoly of through transportation, whose train operations were generally recognized as the principal source of the dangers sought to be eliminated; on the other, the so-called vehicular public, whose small, slow-moving highway vehicles were by force of circumstances compelled to give way to the trains at the crossings. The situation is well summarized in the following language from the Court's opinion in the *Nashville* case:

"The long distance traffic was served almost wholly by the railroads and the water lines. Under those conditions the occasion for separation of grades was mainly the danger incident to rail operations; and the promotion of safety was then the main purpose of grade separation. Then, it was reasonable to impose upon the railroad a large part of the cost of eliminating grade crossings; and the imposition was rarely a hardship." (294 U.S., p. 423)

Consequently, it was not illogical, when the question was first presented to this Court whether a railroad could be required by public authority to pay the cost of constructing a grade separation, that the Court should hold such a requirement to be valid under the Due-process Clause. Having in mind that the vehicles on the highway, to the extent that they handled any rail-bound traffic at all, served merely as feeders of traffic to the railroads, it was generally held that the power of the State to provide for the safety of the public was a sufficient answer to the railroad's claim that its property was being taken without due process of law. Compare: *Northern Pacific R. Co. v. Duluth*, 208 U.S. 583 (1907); *Missouri Pacific R. Co. v. Omaha*, 235 U.S. 121 (1914); *Erie R. Co. v. Board of Public Utility Commis-*

sioners, 254 U.S. 394 (1920). It may be noted that the two cases last cited are among those principally relied upon by the Commission, in its Decision No. 47344 in the *Santa Fe* case, and by reference, to support its conclusions in its case at bar.

The automobile and the motor-truck were developed as dependable means of transportation, during the period following about the year 1915, and at once came into widespread and increasing use. During the same period, the nation's system of hard-surfaced roads was expanded into the vast network that now reaches every part of the country. As a consequence there began to develop also a change of attitude toward the relative responsibilities of the railroads, on the one hand, and the users of the highways, on the other, in respect to grade-crossing separations. Although in many cases the factor of hazard continued to be the consideration publicly urged, it was recognized that the elimination of delays to and interferences with the constantly growing volume of highway traffic was the controlling reason, and the real justification, for the expenditure.

It should be noted, also, that in this period the necessity for a separation was rarely brought about by the construction of a new railroad or relocation of an existing railroad line. By 1925, the locations of the railroads had largely become fixed, and comparatively few new lines or extensions were thereafter built. Total railroad mileage in the United States reached its highest figure, 254,000, in 1916; but by 1935 had declined to 241,000. By contrast, highway mileage increased from approximately 153,000 in the early years of the century (1904), to approximately 3,000,000 in 1935, and since that time has increased still further. Motor-vehicle registration increased from about 55,000 in 1904, to 26,000,000 in 1935, and to more than 46,000,000 in 1952. Moreover, highways as well as motor vehicles have been

greatly improved. The modern multiple-lane "turnpike" or "express-way", which before 1920 was almost unknown, is now a commonplace, especially in the more heavily populated states. The record shows that highway development of this kind has been carried forward aggressively in the Los Angeles area; and that Los Feliz, though not itself a "freeway" as the term is locally understood, affords a direct connection to several highways of that general type.

2. *The Nashville Case:*

These revolutionary changes in the factors influencing grade separations were before this Court, and received its extended consideration, in *Nashville C. & St. L. Ry. v. Walters*, 294 U.S. 405 (1935).

That case involved the validity of an assessment for a grade separation, imposed pursuant to a Tennessee statute providing that in all such cases the railroad involved should contribute one-half of the over-all cost. The railroad challenged the assessment, on the ground that substantial and material changes had taken place, so that the considerations which previously had been held to justify such impositions were no longer controlling. The case had been tried in a lower court of the State, where, upon consideration of the extensive evidence introduced by the railroad, the assessment had been held invalid. The State Supreme Court refused, however, to consider the railroad's showing of special facts, or any of the arguments based thereon, and accordingly sustained the order. Upon appeal, this Court reversed that judgment.

The detailed opinion, rendered by Mr. Justice Brandeis, characterized the recent developments in the relation between rail and highway transportation as "the *revolutionary change* incident to transportation wrought in recent

years by the widespread introduction of motor vehicles".⁴ On the basis of this sweeping development, he stated two major conclusions: (1) grade separations are no longer constructed primarily for reasons of safety, for the railroad has ceased to be the main cause of accidents; they are now essentially economic improvements designed to further the "uninterrupted, rapid movement by motor vehicles", and are comparable to widening the highway, removing curves, shortening distances, etc.; (2) the competitive position of the railroads, as against trucks, buses, and other users of the highways, has changed radically in recent years. The opinion states: "Separation of grades serves to intensify the motor competition and to further deplete rail traffic." (p. 423).

Thus to require a railroad to bear an arbitrary apportionment of the cost of a grade separation, which greatly exceeds the value of the benefit it receives, is to compel it to subsidize its powerful and aggressive competitors.

Having thus concluded that there had occurred a complete reversal of the positions and purposes of the parties in interest in grade separations, this Court held that a mere arbitrary assessment against the railroad of half of the cost of the separation could not be sustained against a claim

⁴ Only two years later, and shortly after it was given regulatory power over the transportation of property by motor carriers the Interstate Commerce Commission reported to the Congress as follows:

"Whether it realizes it or not, the country has in fact experienced a *transportation revolution* in a very short space of time. The automotive highway vehicle has been the principal factor in this revolution. In the carriage of persons, it is now by far the most important means of transportation, and in the carriage of property it is growing in importance every day." 52 Annual Report of ICC (1938), p. 17.

Earlier the Commission had said:

"Competition of the bus and truck is a development of recent years, but it is the most formidable which confronts the railroads." 45 Annual Report (1931), p. 98.

of lack of due process. The standard of allocation required by the Constitution was clearly stated as follows:

"* * * But when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured. (Citations) While moneys raised by general taxation may constitutionally be applied to purposes from which the individual taxed may receive no benefit, and indeed, suffer serious detriment; (Citations) so-called assessments for public improvements laid upon particular property owners are ordinarily constitutional only if based on benefits received by them (Citations)." (294 U. S., at pp. 429-430.) (Emphasis supplied.)

The principle thus stated has never been modified or qualified in the least, by any later pronouncement by this or any other Court.

3. The Action of the Commission:

The Commission's refusal to recognize and apply the benefit principle in the instant case is difficult to understand or explain. For many years the Commission had uniformly followed the benefit principle, without substantial variation. As long ago as 1932 the Commission, in two decisions, involving the proposed enlargement and reconstruction of existing separations, had referred to "the matter of direct financial benefits", as a consideration in the determination of the allocation of the costs, and had stressed the fact that the greatest benefits from these new improvements would accrue to the motoring public, which (as the Commission said) therefore should bear the greater cost (*San Bernardino Application*, 37 Cal. R.C. Reports 506, 509; *Los Angeles Application*, 37 Cal. R.C. Reports 784, 787). In

1933, in a decision already referred to, the Commission went further, and stated and adopted the benefit principle wholeheartedly: *Goshen Junction Separation*, 38 Cal. R.C. 380 (1933). In language very similar to that employed by this Court in the *Nashville* case, the Commission said:

"In allocating the costs here we are departing from the practice which has obtained generally heretofore of assessing one-half to each the public and the railroad in case of an existing grade crossing. While this procedure has appeared equitable in the past the tremendous changes in transportation conditions make necessary a reappraisal of the liabilities of the two parties at interest. The railroad still continues to be the aggressor in preventing the free and unhampered use of the public thoroughfare, but the needs of the traffic on the highway have not only increased and changed in nature, but the use of the highway has become in large measure directly competitive with the rail line. These and incidental conditions following them have changed the benefits flowing from the separation of grades between these two great avenues of traffic.

"After carefully considering all the evidence in these proceedings, it is concluded that the order should authorize the grade separation, as proposed, and fix the amount to be contributed by the railroad in a lump sum based upon direct and indirect benefits. * * * " (38 C.R.C. Repts., at p. 386) (Emphasis supplied.)

In a series of three decisions later in the same year, the Commission affirmed its conclusions in the *Goshen* case (*Madrone Underpass*, 38 Cal. R.C. Reports 425; *Alta Overpass*, 38 Cal. R.C. Reports 606; *El Monte Underpass*, 38 Cal. R.C. Reports 612). Thus, the Commission established a policy and rule which continued to prevail in California for more than 16 years; i.e., until the Commission rendered its

first decision (No. 43374, October 4, 1949, 49 Cal. P.U.C. Reports 147) in the *Santa Fe* case.⁵

During that period, appellant and its system lines in California were parties to 104 proceedings involving grade separations. In each case the question of cost allocation was settled on the benefit basis. In most instances such settlements were by agreement between the railroad and the public authority; but in a limited number of cases the question was referred to and determined by the Commission. Each allocation, including those accomplished by agreement, was required to be, and in fact was, approved by formal order of the Commission. So far as appears from the public record of these proceedings, no difficulty was encountered during all this period in making allocations on the benefit basis, nor was the principle ever seriously challenged.

The Commission's rejection here of the benefit principle, when invoked *by the railroad*, is the more difficult to understand and explain, in the light of the Commission's recognition, in this *same* decision, of the *same* principle, when invoked and relied upon *by the State Department of Public Works*. As the opinion shows (Appendix A, *infra*; 51 Cal. P.U.C. Reports, at p. 790) the representative of the Department contended "that since the separation would not be of any *benefit* to a state highway nor *benefit* the nearest state highway", the Commission had no jurisdiction to impose any portion of the costs on the Department; and the Commission found (although erroneously, as its own opinion shows) that the construction did not "concern a state high-

⁵ As previously stated, the Commission's Decision No. 47344, on rehearing in that same proceeding, was rendered on June 24, 1952, 51 Cal. P.U.C. Reports 771; and is cited in the decision of the Commission in the instant case. See Appendix A, and 51 Cal. P.U.C. Reports, at page 795. The Supreme Court of California denied the Santa Fe's petition for writ of review, and the railroad thereupon appealed to this Court, the order allowing the appeal having been signed on February 26, 1953.

way"; and held that "accordingly, the Department . . . is not directly involved".

The Commission offered no reason for its refusal to apply the benefit principle similarly in fixing the railroad's contribution, except to state that its power to allocate costs was an exercise of the police power of the State, and therefore it was "not bound to follow the so-called benefits theory". The Commission did not (and, in view of the evidence offered through its own Transportation Engineer, obviously could not) assert that there was any difficulty or hindrance to prevent an accurate estimate of the values of the benefits accruing to the several parties. In fact, in this same paragraph (51 Cal. P.U.C. Reports, p. 796) the Commission referred to its own previous summary of the testimony setting forth these estimated benefits. Moreover, the Commission affirmatively stated, on the same page, that the "great increase in automotive vehicular traffic is one of the reasons for constructing a grade separation"; and, by its reference to the testimony establishing the economic justification of the separation, made it clear that in fact the furtherance of the speedy and unimpeded movement of motor traffic was the primary and controlling reason.

It should be added that, emphatically, elimination of alleged hazards at the crossing was not urged, nor declared, or apparently believed, to be of material significance. The exhibit prepared by the several parties jointly, including the Commission's own Transportation Department, which is reproduced in part at pages 86-91 of the Appendix to appellant's petition for writ of review, shows that only 14 collisions between trains and motor vehicles occurred at the Los Feliz crossing, in a period of 25 years and three months (January 1, 1926, to March 31, 1951), and resulted in but ten injuries to persons (one of which was fatal). On the basis of the actual volume of motor traffic moving over the

crossing (which increased from about 14,000 vehicles per day in 1925, to 27,000 per day in 1951), the computed actual hazard of collision between a vehicle and a train is less than one in 13,000,000; the mathematical chance of personal injury, due to such a collision, is less than one in 36,000,000.

Thus the Commission is in the completely inconsistent position of acknowledging here the existence, on a much greater scale, of the very conditions which in 1932-33 convinced it of the correctness of the benefit principle; and of declaring in effect, in a single paragraph of its opinion, that although these conditions, now greatly accentuated, are a motivating reason for the separation, they are no reason at all for following the benefit principle *when urged by the railroad*; this, moreover, notwithstanding that in the next preceding paragraph the same principle, *when urged by a State agency*, is approved and applied. The same factors which in 1933 were held to justify the sweeping modification of the prior general practice, in the light of a reappraisal of the respective liabilities of the parties, are in 1952 wholly ignored; indeed, the great increase in population, and the tremendous increase in motor-vehicle traffic, are now asserted (Decision No. 47344, 51 Cal. P.U.C. Reports 771, 781, incorporated by reference in Decision No. 47420 in the case at bar, 51 Cal. P.U.C. Reports, p. 795; Exhibit A, *infra*) to present a new problem, which justifies a *retrogression* to the arbitrary basis discredited and discarded 20 years ago.

4. *The Present Position of the Railroads:*

The tremendous increase and intensification of highway traffic have worked the transformation of the highways, from the role of railroad feeders, into a vast independent transportation system, competitive with the railroads, and in many situations so completely effective as to force the

railroads to withdraw from the field. The trends noted in the *Nashville* opinion have continued and accelerated in the years since that decision was rendered. There is no question that the "revolutionary change", noted by this Court and the Interstate Commerce Commission,⁶ has become progressively more extreme, as the following statistics illustrate.

In 1904 the highway mileage of the United States was 153,662; by 1949, the total had increased to 3,326,000. By comparison, total railroad mileage reached its highest figure, 254,000, in 1916; but by 1949, had declined to 225,000.

In 1904 there were in the United States only about 55,000 registered motor vehicles; but in 1935 there were over 26,000,000; and in 1949, more than 44,000,000. By comparison with this tremendous increase in motor vehicles, the total number of units of railroad equipment in service has actually declined. Passenger cars in service decreased 27 percent between 1916 and 1949. During the same period the number of locomotives in service decreased 34 percent, and the number of freight cars in service, 22 percent. While it is true that the cars and locomotives in service today are of much greater capacity, and generally capable of more continuous use, than in 1916, it is also true that automobiles, motor trucks, and motor buses are also greatly improved, and equally capable of much more continuous service. Consequently, the comparisons of the actual extent of the physical facilities of the competing highway and rail carriers demonstrate the continuing and uninterrupted growth of motor-vehicle transportation, and the corresponding relative decline of the competitive position of the railroads.

The increase in the proportion of all commercial traffic handled by motor vehicles has also been spectacular. In

⁶ See footnote 4, *ante*.

1925, the railroads hauled 77.4 percent of the commercial inter-city freight traffic, while the trucks hauled 2.1 percent. *Pacific Intermountain Express Co.—Control and Purchase*, 57 M.C.C. 341, 365. By 1940, the change noted in the *Nashville* case had become unmistakable. Railroad participation in total freight traffic had decreased to 62.3 percent, but the trucks had quadrupled their proportion, to 8.4 percent of the total. In 1950, the relevant figures showed a further decrease in the railroads' share of freight traffic, to a low point of 58.7 percent; while the trucks hauled 12.4 percent of the total inter-city freight traffic. *65th Annual Report of I.C.C.*, p. 20. This represented another increase of approximately 50 percent for the motor vehicle competitors of the railroads.

The shift of short-haul, local business to the trucks has been even more extreme. For example, in 1949, the steam railroads handled only 20.9 percent of California intra-state business; the highway carriers hauled 73.7 percent. What has happened in the field of passenger traffic is equally striking. The railroad percentage of the passenger traffic business, excluding that moving by private automobile, declined from 75.7 percent in 1926, to 62.1 percent in 1936, and 50.5 percent in 1950. *Report of Special Committee of National Association of Railroad and Utilities Commissioners*, dated November 11, 1952, p. 66. During this same period, the proportion hauled by the buses increased from 9.3 percent of the total in 1926, to 29 percent in 1936, and 33.8 percent in 1950. But the "revolution" has been most drastic in the shift of the railroad passenger business to the private automobile. In 1936, automobiles accounted for over 197 billion inter-city passenger miles; while in 1950, the total for automobiles was over 337 billion, which represents 84.34 percent of the total inter-city passenger miles for that year. (*Ibid.*) It is plain that the change which

the Court emphasized in the *Nashville* case has persisted and gained momentum in the years since.

In the *Nashville* case this Court also stressed the fact that in the days before motor vehicles became commercially important:

“* * * the need for eliminating existing crossings, and the need of new highways free from grade crossings, arose usually from the growth of the community in which the grade separation was made; this growth was mainly the result of the transportation facilities offered through the railroad; the separation of grade crossings was a normal incident of the growth of rail operations; and as the highways were then feeders of rail traffic, the community's growth and every improvement of highway facilities benefited the railroad.”
294 U.S., at p. 423.

While there has been a very significant growth of the community here involved in recent years,⁷ that growth reflects and is reflected by the great increase in highway traffic. During the same period, on the other hand, railroad facilities have remained relatively static. In fact, appellant's annual reports to the California Commission show that in the last two decades appellant's train operations in freight and passenger service in California have actually declined by about 11 percent, comparing the totals of train-miles produced in the years 1949-51, with the corresponding figures for the years 1927-1929.

There is no possible justification, therefore, for the Commission's refusal to follow the principles enunciated in the *Nashville* case. On the contrary, the changes in the competitive picture since that time fortify the reasoning of

⁷ Census figures show that from 1930 to 1940, the population of the State of California increased by about 52 percent, and from 1940 to 1950 the increase was 53.3 percent. For Los Angeles County, the population growth from 1930 to 1950 was approximately 100 percent.

25
this Court, and compel adherence to the path marked by its decision in that case.

5. *Recent Informed Approach to the Problem:*

If continuing research and informed public opinion had cast doubt on the principles set out in the *Nashville* case, the Commission might have attempted to justify its action on the ground that reconsideration of the "relative benefit principle" is essential. The fact is, however, that critical appraisals of the grade-separation problem have clearly and unanimously approved this Court's recognition of the fundamental change in the relationship between railroad and highway traffic, and its effect upon allocation of the costs.

The most recent and complete study of the problem is a monograph published by the Stanford Research Institute^{*} Much that is there said is relevant to the problems here presented and is commended to the Court's attention. The Institute's approach may be indicated by this paragraph (at pp. 45-46):

"The need for grade crossing improvements and eliminations arises only because of the demands of the various beneficiary groups for transportation service. In order to justify such improvements from an economic standpoint, it is necessary to take into account the demands of the various groups for the improvements. Sufficiently accurate measurements of the various demands can be determined by measuring the benefits each group at interest will derive from the improvements. The relative dollar values of these economic benefits must be the basis for distribution of the costs to each group."

^{*} *The Railway-Highway Grade Crossing Problem* (The Stanford University Press, 1952). Copies of this monograph are being furnished to the Clerk of this Court for its judicial notice.

The Institute dismisses the policy adopted by the Commission of assigning costs to the railroad on the basis of an arbitrary percentage of total costs as:

"* * * no more realistic or economically sound than is an assumption that the economic nature and character of the grade crossing area, crossing usage, and highway development and usage may be identical as between grade crossings." (p. 47)

Other evidence of informed thinking on the subject is provided by the fact that Congress and a number of State legislatures have, since the *Nashville* case was decided, enacted statutes providing for allocation of grade-separation costs to the railroads on the benefit basis, generally with a maximum assessment upon the railroads of from 10 to 25 percent.* An Indiana Highway Commission official states that:

"This legislation can be considered an indication of the trend of popular thought on this subject. Previous laws in Indiana required the railroads to bear one-half of the cost of such installations." Milner, *Danger or Delay*, 35 *National Safety News* (May, 1937) 11, 12.

It can hardly be denied, therefore, that in reverting to an arbitrary 50-percent allocation basis, the Commission has disregarded not only the governing declarations of this Court on the subject, but also the informed judgment of experts, and the "trend of popular thought on this subject".

In addition, and particularly in view of the magnitude of the problem presented, the rule applied by the Commission will clearly impose an undue, and ultimately intolerable burden on interstate commerce, contrary to the Commerce

* Federal: Federal Aid Highway Act of 1944, 58 Stats. 838 (10%); Indiana (20%); Maryland (25%); Michigan (15%); New Jersey (15%); New Mexico (10%); New York (15%); Ohio (15%); West Virginia (10%).

Clause of the Constitution, and the National Transportation Policy, enacted by Congress to implement that Clause.¹⁰

In *King v. United States*, 344 U.S. 254, 262 (1952), this Court expressly recognized as a pressing problem in implementing the National Transportation Policy as to the railroads,

"the growth of vigorous competition from automobiles and other forms of transportation which made it futile to compensate for the passenger deficit by increasing passenger rates."

The same competitive problem has also been emphasized by the Interstate Commerce Commission in connection with the diversion, particularly in recent years, of freight traffic from railroads to trucks and other carriers. *Ex Parte 168*, 276 I.C.C. 9, 46 (1949). This increasing competition, together with rising costs, has held the railroad to "sub-standard" rates of return, in spite of a series of post-war rate increases. *Ex Parte 175*, 284 I.C.C. 589, 612 (1952). These conditions have caused a Congressional Committee to express concern as to the "precarious financial position" of the railroads. Sub-Committee of the Senate Committee on Interstate and Foreign Commerce, *Sen. Rep. No. 1639*, 82d Cong., 1st Sess., 46 (1951).

The imposition of grade-separation costs upon the railroads at once increases their operating costs and reduces those of highway carriers, thus improving the already

¹⁰ "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; * * * all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense." 54 Stat. 809 (1940).

strong competitive position of the latter. The Commission's new policy, if not reviewed by this Court, will thus impose expenses upon the railroads which simply cannot be met, thereby accentuating the difficulty of preserving an adequate national transportation system.¹¹

6. *The Importance of this Appeal.*

The facts of this case are, of course, important in that they constitute the framework upon which is woven a question arising under the Constitution of the United States. They are also important, however, because they are characteristic of a development presently being experienced in every part of the nation. That development is the continuing rapid growth of truck, bus, and automobile traffic upon the highways, and the consequent pressure for the elimination of more and more grade crossings, and the construction of additional grade separations, solely for the purpose of speeding up and thus reducing the cost of the highway traffic. The following excerpts from the Commission's principal decision in this case (51 Cal. P.U.C. Reports, at p. 791; Appendix A, *infra*) summarize the evidence showing the essential reasons here assigned:

"A portion of Exhibit No. 2, relating to the importance of the proposed grade separation and its relation to the freeway plan and to major highway arteries, was presented by the Planning Director of the City of Glendale. It was the testimony of this witness that *the proposed grade separation is of utmost importance due*

¹¹ Under the rigid formula now being applied by the Commission, the railroad is not only required to pay one-half the cost of the improvement, without regard to any benefits received, but as a large taxpayer of the city and state must participate substantially also in bearing the other half of the cost. This double burden is given emphasis by the facts recited by this Court in the *Nashville* case, that nearly 28% of the railroad's gross revenues is required annually to pay state and local taxes plus cost of maintaining its roadway, whereas commercial motor carriers moving on public roads pay not more than 7% of their gross revenues in state and local taxes. (204 U.S., at pp. 427-428.)

to the heavy population of the area and to the daily flow of vehicles and trains at that intersection. This grade separation project was number one on the priority list of the Los Angeles County Grade Crossing Committee in 1923, and the ensuing years have not decreased its importance. *Los Feliz Boulevard*, according to this witness, has reached its capacity and at the present time is carrying an overload. This situation has made it urgent to effect the grade separation. Exhibit No. 5 is a map showing the crossing herein considered and the adjoining area. * * *

"The Principal Traffic Engineer of the City of Los Angeles presented testimony relating to the grade crossing and stated that, in his opinion, a grade separation was needed. He pointed out that the stoppage of traffic at the railroad crossing at *Los Feliz* would cause a 'backlash' of traffic which would affect traffic on *San Fernando Road*. The distance between the railroad crossing and *San Fernando Road* is approximately 820 feet, which distance is equivalent to a storage capacity of approximately 38 cars in each of the three lanes of traffic. Checks have disclosed that there are times when more than 38 automobiles in each lane are held up due to a train blocking the crossing and, as a result, the 'backlash' of these automobiles congests *San Fernando Road*. Therefore, in the opinion of this witness, a grade separation would not only relieve congestion at this particular crossing but would also relieve congestion on *San Fernando Road*." (Emphasis added.)

It is, therefore, apparent that the real and controlling reason for the *Los Feliz* separation is simply to eliminate delays to and stoppages of motor-vehicle traffic, and thus to enable that traffic, much of it directly competitive with appellant's railroad, to move faster and at less expense.

As of December 15, 1949, there were 13,130 grade crossings in California; and as of the same date, 809 grade separations (*Highway Safety Investigation*, 1950: 50 Cal. P.U.C. Reports 29, 36). The conditions which impelled the

City of Glendale to present its proposal for the six-lane grade separation at Los Feliz are not confined to that location or even to that particular area; on the contrary, similar situations, of equal or even greater urgency and popular appeal, exist in nearly every community served by appellant, in not only California but also the seven other States traversed by its rails. In the 14 years, 1935-1949, the number of separations in California increased by 203, or at the rate of more than 14 per year; and since 1949 this rate of construction has been maintained, if not accelerated. In 1950, in the decision last above referred to, the Commission estimated that the complete separation of all main and branch-line grade crossings in the state (some 9788 in number at the time) would involve an expenditure of about *two and one-half billion dollars*. The results of the Commission's reversion to the arbitrary and inflexible rule of allocating 50 percent of the cost to the railroads thus assume tremendous importance—indeed, they threaten the very existence of the railroads, as financially solvent and stable institutions capable of rendering essential public services.

Conclusion

At the risk of repeating what may be obvious, we here emphasize that this appeal does not involve any question of the desirability or propriety of the Los Feliz separation, nor does it constitute any attempt by appellant to prevent or delay that construction. Appellant has never opposed the separation, nor regarded it as other than a worth-while improvement, primarily in the public interest and for the public benefit, from which appellant also will derive a well-defined, but relatively minor benefit. Appellant has been and is ready and willing to contribute on the basis of that benefit, in accordance with the principles stated by this Court in the *Nashville* case.

The broad question here is therefore whether the *Nashville* case is to be overruled and cast aside; for there can be no question that the Commission's decisions herein are directly in conflict with this Court's judgment in that case.

It is submitted that the appellate jurisdiction of the Court has been duly invoked; that the federal questions involved are substantial in merit, and of outstanding public importance; and that this Court's consideration of the appeal upon full briefs and arguments is therefore appropriate and essential.

Respectfully,

GEORGE L. BULAND

E. J. FOULDS

BURTON MASON

RANDOLPH KARR

Attorneys for Appellant

Dated: March 23, 1953.

APPENDIX A

DECISION NO. 47420, APPLICATION NO. 32385,
CASE NO. 5327

(June 30, 1952).

[51 Cal. P.U.C. Reports 788]

The City of Glendale authorized and directed to construct Los Feliz Road at separated grades under certain Southern Pacific Company tracks, among which are the Valley and Coast Lines main line tracks. The Commission also determined allocable costs and apportioned 50% to Southern Pacific Company, 25% to Los Angeles County, 12½% each to the Cities of Los Angeles and Glendale.

[1] **CROSSING—GRADE SEPARATIONS—DIVISION OF COSTS.** The authority of the Commission to allocate costs stems primarily from Section 1202 of the Public Utilities Code and is an exercise of the police power. The Commission is not bound to follow the so-called "benefits" theory.

John H. Lauten, Assistant City Attorney, for the City of Glendale, petitioner. *Randolph H. Karr*, for Southern Pacific Company, respondent. *Roger Arnebergh*, Assistant Attorney, for the City of Los Angeles, and Councilman John C. Holland and Councilman Ernest E. Debs, and Hugo Winter of City Engineer's Office, and Mr. T. M. Chubb, Chief Engineer and General Manager of the Department of Public Utilities and Transportation; *Hodge L. Dolle* for Department of Public Works, and *George Langsner*, Engineer, *John N. McLaurin* for the Department of Public Works, and *Herbert J. Williams*, Department of Public Works; *Robert W. Walker* and *Joseph R. Cummins* for The Atchison, Topeka and Santa Fe Railway Company; *E. E. Bennett* for the Union Pacific Railroad Company; *Sam R. Kennedy*, Road Commissioner, County of Los Angeles, *Charles W. Sprutte*, Construction Engineer, Road Department of Los Angeles, for the County of Los Angeles; *John P. Commons* for the Regional Planning Commission, Los Angeles County; *H. F. Holley*, Assistant Chief Engineer

for the Auto Club of Southern California, for the Los Angeles County Grade Crossing Committee; *H. Allen Smith*, Assemblyman 43rd District, for the City of Glendale as a member of the California State Assembly, and *Fred G. Seig*, Legislative Representative, for the Order of Railway Conductors, interested parties. *Hal F. Wiggins* for the Commission staff.

OPINION

This matter concerns an existing grade crossing at the intersection of the tracks of the Southern Pacific Company and Los Feliz Road in Glendale and Los Feliz Boulevard in Los Angeles. The tracks, consisting of two standard gauge main tracks, one standard gauge passing track and two standard gauge yard tracks, run in a northwesterly-southeasterly direction, while Los Feliz, designated as a road in Glendale and a boulevard in Los Angeles, runs in a northeasterly-southwesterly direction. The boundary line between the two cities parallels the tracks in the area of the intersection. Four of the above-mentioned tracks are in Glendale, [789]¹² and one, a yard track, is in Los Angeles. The grade crossing is designated as Crossing No. B-476.8, and the legal description of that portion in Glendale is as follows:

That portion of the right-of-way (100 feet wide) of the Southern Pacific described in deeds recorded in Book 14094, page 214, and in Book 17837, page 49, Official Records in the office of the Recorder of Los Angeles County, California.

The legal description of that portion of the grade crossing in Los Angeles is as follows:

A strip of land having a uniform width of 30 feet, its northeasterly line being coincident and identical with the southwesterly line of the Southern Pacific main line right-of-way (100 feet wide), said strip of land extending from the southeasterly line of Los Feliz (100 feet wide) to the northwesterly line of said Los Feliz.

¹² Numbers in parentheses indicate pages of the official printed report.

Applicant, the City of Glendale, requests an order authorizing and requiring the construction of a grade separation at the above-described crossing and further requests that there be in the order a designation of the portions of the work and construction to be done by Glendale, Los Angeles and the Southern Pacific, respectively, as well as an allocation of the costs thereof.

Subsequent to the filing of the application on May 7, 1951, this Commission on September 25, 1951, issued an Order of Investigation to determine whether or not, "in the interest of public safety, convenience and necessity", the grade separation should be constructed and also to determine "the proportions in which the expense of constructing and maintaining such a separation shall be divided among the Southern Pacific Company, the City of Los Angeles, the City of Glendale, the County of Los Angeles, the Department of Public Works, Division of Highways, of the State of California, or other political subdivisions affected." * * *

Public hearings were held in Los Angeles before Commissioner Huls and Examiner Syphers on October 3, November 1 and 29, 1951, during which evidence was adduced, and on the last-named date the matter was submitted with the parties being granted the right to file briefs. Briefs now have been filed and the matter is ready for decision.

At the outset of the hearings the City of Los Angeles introduced into evidence Exhibit No. 1, which is a copy of a resolution of the City Council of Los Angeles, dated October 1, 1951. This resolution adopted a report of a joint committee previously appointed by the council, which report states that since the proposed grade separation lies completely within the City of Glendale and that, therefore, the Public Utilities Commission has no jurisdiction to require the City of Los Angeles to pay any portion of the cost, nevertheless the City of Los Angeles is not opposed to a [790] Commission order which would allocate some costs to the City of Los Angeles subject to the City's agreeing to pay.

The representative of the Department of Public Works of the State of California stated the position of that depart-

ment to be that, since the proposed grade separation would not be of any benefit to a state highway nor benefit the nearest state highway which is approximately 1,000 feet away, the Public Utilities Commission is without jurisdiction to impose any portion of the costs on the Department of Public Works, Division of Highways.

The Chairman of the Board of Supervisors of Los Angeles County, during the course of the hearings, stated that in his opinion the County of Los Angeles would probably contribute to the cost of the proposed grade separation.

As a result of a prehearing conference, at which all of the parties hereto were represented, held prior to the commencement of the formal hearings, a committee was appointed to make a study and prepare an engineering report. This committee, under the chairmanship of the Chief Engineer of this Commission, presented such a report as Exhibit No. 2, various parts thereof being explained by various members of the committee during the course of the hearings.

The Chief Engineer of the Public Utilities Commission, in presenting the first part of this report, outlined the historical background of the matter in question. By Decision No. 17330, dated September 10, 1926, this Commission issued an order directing the elimination of the grade crossings at Los Feliz Boulevard (that here being considered) and also at Brand Boulevard. The decision recommended an underpass be constructed at each location. Subsequently, alleging that finances were not available for such construction, the parties requested dismissal of the proceedings and the matter was dismissed by Decision No. 27098, dated May 28, 1934.

By House Resolution No. 24 of the California Legislature, at its 1949 session, the Commission was directed to initiate proceedings with a view to obtaining grade separations at Los Feliz Boulevard, Glendale-Brand Boulevards, and Fletcher Drive. As a result of this resolution the President of the Public Utilities Commission transmitted a report to the Assembly, dated March 6, 1950, setting forth the results of an engineering study showing the estimated costs, economic justification, and problems of financing of the proposed grade separations. Subsequently, the Legis-

lature, by Assembly Concurrent Resolution No. 88 of the 1951 session directed the Commission to hold hearings on the Los Feliz crossing, and the Commission's investigation was instituted accordingly.

[791] A portion of Exhibit No. 2, relating to the importance of the proposed grade separation and its relation to the freeway plan and to major highway arteries, was presented by the Planning Director of the City of Glendale. It was the testimony of this witness that the proposed grade separation is of utmost importance due to the heavy population of the area and to the daily flow of vehicles and trains at that intersection. This grade separation project was number one on the priority list of the Los Angeles County Grade Crossing Committee in 1923, and the ensuing years have not decreased its importance. Los Feliz Boulevard, according to this witness, has reached its capacity and at the present time is carrying an overload. This situation has made it urgent to effect the grade separation. Exhibit No. 5 is a map showing the crossing herein considered and the adjoining area.

In connection with this testimony the City Engineer and Street Superintendent of the City of Glendale presented that part of Exhibit No. 2 relating to traffic checks which were made in the area of the present grade crossing. Likewise, this witness presented Exhibit No. 4, which is a more detailed study of these traffic checks. This exhibit shows the number of motor vehicles and the number of pedestrians at the crossing during 24-hour periods on June 17, 18, and 20, 1951, and also shows the delay in vehicles caused by freight trains during these same periods.

The Principal Traffic Engineer of the City of Los Angeles presented testimony relating to the grade crossing and stated that, in his opinion, a grade separation was needed. He pointed out that the stoppage of traffic at the railroad crossing at Los Feliz would cause a "backlash" of traffic which would affect traffic on San Fernando Road. The distance between the railroad crossing and San Fernando Road is approximately 820 feet, which distance is equivalent to a storage capacity of approximately 38 cars in each

of the three lanes of traffic. Checks have disclosed that there are times when more than 38 automobiles in each lane are held up due to a train blocking the crossing and, as a result, the "backlash" of these automobiles congests San Fernando Road. Therefore, in the opinion of this witness, a grade separation would not only relieve congestion at this particular crossing but would also relieve congestion on San Fernando Road.

The Assistant District Traffic Engineer of the California Division of Highways likewise presented testimony relating to a traffic count made for four hours during the evening peak on October 15 and four hours during the morning peak on October 16, 1951. As a result of this check it was the opinion of this witness that train movements across the existing crossing occasionally affect San Fernando Road traffic but are usually minor in effect. He was of the further opinion that the total benefits to Route No. 4 (San Fernando Road) due to the proposed grade separation [792] on Los Feliz Road would be negligible in amount. Exhibit No. 9 is a report of the study made by this witness.

The Street and Parkway Design Engineer of the Bureau of Engineering, City of Los Angeles, presented testimony as to that part of Exhibit No. 2 relating to the estimate of cost. Under the plan proposed, Los Feliz Boulevard is to pass under the Southern Pacific Company's tracks. There will be two 40-foot roadways separated by a median strip with five-foot sidewalks along each side of the boulevard. The structure will be 105 feet wide and the underpass will have 5% and 6% grades on the westerly and easterly approaches, respectively. During the course of construction there will be a full-width detour for traffic.

Three possible methods of handling the storm waters were studied and, in the opinion of this witness, the most desirable would be to construct a storm drain which would be a portion of a permanent drainage system in the area. The other two methods were a gravity storm drain in Los Feliz Boulevard and a storm drain based on a storage basin and limited outflow by pump to Los Feliz Boulevard. Inas-

much as the gravity storm drain was estimated to be the least expensive of the three methods, it was used in the estimate of costs presented. The summarized estimate of cost for the underpass is set out hereinbelow:

| | |
|---|-------------|
| Bridge | \$ 403,200 |
| Streetwork (includes excavation, paving, sidewalk, curb, guardrail) | 127,100 |
| Outer highway (South side—between Gardena Ave. and Railroad St. in Glendale)..... | 6,600 |
| Proposed Street (between Fernando Ct. and Los Feliz Boulevard in Glendale) | 11,500 |
| Sanitary sewers | 14,500 |
| Storm drains | 249,100 |
| Retaining walls | 52,000 |
| Detour (Street) | 28,800 |
| Railroad shoofly .. 8 | 96,500 |
| Railroad signal work | 4,000 |
| Right of way | 497,000 |
| <hr/> | |
| Total | \$1,490,300 |
| Engineering & contingencies (15%)..... | 223,500 |
| <hr/> | |
| Grand Total | \$1,713,800 |

This witness also presented testimony as to the possibility of creating an overpass so that the street would go over the railroad but this method was found to be considerably more expensive than the underpass and accordingly was not recommended.

Exhibit No. 3 consists of photographs, maps, plans and profiles of the proposed grade separation.

A section of Exhibit No. 2, devoted to the economic justification for the proposed separation, was presented by a Supervising Transportation Engineer of the Public Utilities Commission. This portion of the study [793] purported to assign a monetary value to certain benefits which might accrue from the construction of this grade separation. The results of this study are set out hereinbelow:

| | | |
|---|----------|----------|
| Vehicular Delay | \$57,362 | |
| Railroad operation cost, gatemen, maintenance | 14,053 | |
| Accident damages paid by railroad..... | 475 | \$71,890 |
| Depreciation on railroad portion of structure | 6,991 | |
| Maintenance on same (Excluding track).... | 1,620 | 8,611 |
| Net annual savings | | \$63,279 |

| | |
|---------------------------------------|-------------|
| Above savings capitalized at 3%..... | \$2,109,000 |
| Above savings capitalized at 4% | 1,582,000 |
| Above savings capitalized at 5%..... | 1,266,000 |

It should be noted that a bank official testified that the present cost to Southern Pacific to obtain money on a long-term basis is 5%.

While the foregoing study indicates that the railroad would receive monetary benefits from the construction of the proposed grade separation, this theory was contested by testimony presented by railroad witnesses. The Superintendent of the Los Angeles Division of the Southern Pacific Company testified that the separation of grade at this crossing would be of no benefit to the railroad. He pointed out that the passenger trains using the line do not need to block Los Feliz since they are main line trains and proceed through without any delay. While the passenger trains stop at the Glendale Station, there is ample room for westbound trains without affecting Los Feliz Boulevard, and the eastbound trains can be stopped so as to clear Los Feliz. Freight trains, according to the witness, normally do not stop at the Glendale Station, and he stated there is a company instruction that the maximum number of freight cars on any freight train in the Los Angeles Division be limited to 100 cars. The switching in this area is done during night hours and, according to the testimony of this witness, is of such a small amount that it causes no serious obstruction to traffic. This witness was of the further opinion that there would be no saving to the com-

pany in money paid to employees, for, although a grade separation might save a little time so far as the work of the yard crews is concerned, yet these same crews would be required to be on duty for the same number of hours as at present.

The Road Foreman of Engines of the Los Angeles Division of the Southern Pacific Company described the switching performed in the vicinity of the Los Felix crossing, and corroborated the testimony of the above witness to the effect that a grade separation would be of no benefit to the railroad inasmuch as the switching movements are very short. He likewise corroborated the testimony that the expense to the railroad in the form of employees' wages would not decrease were a separation constructed.

[794] The last portion of Exhibit No. 2, relating to the Assistant to the Chief Engineer of the Southern Pacific Company. It was his testimony that the possibility of securing steel and other necessary metals and cement for the project was very uncertain. This witness also testified as to the estimated monetary benefits to the railroad through the construction of a separation, and concluded that the net annual benefit would amount to \$5,917. These estimates are set out in Exhibit No. 20, and are listed hereinbelow:

| | | |
|--|----------|----------|
| Railroad operation cost (gatemen, maintenance) | \$14,053 | |
| Accident damages paid by RR..... | 475 | \$14,528 |
| Depreciation on RR portion of structure.... | \$ 6,991 | |
| Maintenance of same, excluding track..... | 1,620 | \$ 8,611 |
| Net annual benefit to railroad | | \$ 5,917 |

It will be noted that the figures of the Assistant Chief Engineer of the Southern Pacific Company are identical with those of the Supervising Engineer of the Public Utilities Commission except that the former has not included any estimate as to vehicular delay, it being his contention that the elimination of delay to motor vehicles would not be a benefit to the railroad. It was the opinion of this witness that the above estimated annual benefit to the

railroad, capitalized at 5%, should constitute the maximum amount which the Southern Pacific Company should be required to contribute to the cost of construction of the proposed overpass. This amount is \$118,340.

This same witness presented testimony as to the drainage problem in the vicinity. It was his opinion that the drainage problem should be solved before any grade separation is contemplated. He pointed out that Exhibit No. 2 estimates the cost of storm drains to be \$249,100. These costs should not be assessed to the structure. This witness further estimated that the storm drains could be constructed for \$28,500 instead of the larger figure shown above. This would reduce the cost of the proposed structure from \$1,713,800 to \$1,460,155. Exhibit No. 21 shows these estimates. It should be noted that the storm drain proposed by this witness would provide drainage for the structure only. His estimate of the cost of this type of storm drain is set out hereinbelow:

| | |
|---|-----------------|
| Rainfall area, 125,630 sq. ft. Gallons per minute 1,650 | |
| Pumphouse & storage box | \$15,500 |
| Pumps & electric equipment | 10,500 |
| 500' 18" RCP—in place—\$5.00 lin. ft..... | 2,500 |
| Total | \$28,500 |

Further testimony relating to the drainage problem in this area was presented by an engineer of the Bureau of Engineering Storm Drain and Design Division of the City of Los Angeles. He presented Exhibits Nos. [795] 22 and 23, drainage maps of the area showing the elevations and the general slope. Concerning the estimate of the Engineer for the Southern Pacific Company as to a proposed drainage system consisting of a sump and pump which would cost approximately \$28,500, this witness contended that that estimate did not include any allowance for maintenance and that, in his opinion, a gravity flow system would be more satisfactory and provide a safer drainage operation. This opinion was corroborated by additional testimony presented by the Street and Parkway Design

Engineer of the Bureau of Engineering of the City of Los Angeles.

The railroad presented testimony through its Lease Clerk showing historical data as to the railroad right of way in the area. Exhibit No. 10 shows that the Southern Pacific Company acquired the land in 1873, and exhibits Nos. 11 to 15, inclusive, relate to various deeds and indentures concerning the property rights of way and easements in the area. Additional testimony in this respect was presented by the Chief Draftsman of the Southern Pacific Company which tended to show that the railroad was established in the area prior to the establishment of Los Feliz. It was stipulated between the parties that the grade crossing was first established some time between 1887 and 1912. Exhibits Nos. 16 to 18 are profile and strip maps of the railroad in that area, while Exhibit No. 19 is a blueprint showing the plan of the Southern Pacific Company's station at Glendale as of May 1951.

After a full consideration of all of the evidence and having the benefit of the briefs filed by the parties in this matter, we hereby find it to be in the interest of public safety, convenience and necessity and that it would be practicable to require the construction of a grade separation at the intersection of the tracks of the Southern Pacific Company and Los Feliz Road and that the plan prepared by the subcommittee, as presented in Exhibit No. 2 and hereinbefore described, sets out the construction which would be most practicable and would best meet the public safety, convenience and necessity in this matter.

Concerning the allocation of costs of this construction, we find from this record that the proposed construction does not concern a state highway and that, accordingly, the Department of Public Works of the State of California is not directly involved. However, we are cognizant of the position of the City of Los Angeles and of Los Angeles County, as stated during the course of the hearings.

While the railroad contended that the costs should be assessed according to the so-called "benefits" theory, we affirm our holding in Decision No. 47344, dated June 24, 1952, on Application No. 29396, wherein it was held that

[1] the authority of this Commission to allocate costs stems primarily from Section 1202 of the Public Utilities Code and is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. Therefore, we are [796] not bound to follow the so-called "benefits" theory, although it is appropriate to observe that the proposed grade separation will obviously be of benefit to the railroad. Both the testimony of the Supervising Transportation Engineer of the Public Utilities Commission and of the Assistant to the Chief Engineer of the Southern Pacific Company, as set out hereinbefore, show various estimated benefits. The City of Glendale in its brief takes the position that, in the absence of the railroad, the present highway would be adequate and no grade separation would be necessary. Therefore, that City contends that all of the costs should be borne by the railroad. We do not subscribe to this contention, for the evidence shows that the great increase in automotive vehicular traffic is one of the reasons for constructing a grade separation.

According to the evidence the estimated cost of the entire project amounts to \$1,713,800. Of this amount, \$249,100 is for a gravity storm drain extending from a point easterly of the underpass to the Los Angeles River. Another estimate submitted showed that a sump and pump storm drain for the structure alone could be constructed for \$23,500. We are of the opinion and hereby find that, while the more elaborate gravity storm drain is a desirable construction, yet it would provide draining for more than the structure area. Accordingly, the entire cost of such a storm drain should not be included in any costs which are apportioned to the railroad. Deducting the difference in cost of the storm drains, the allocable cost of the structure is hereby found to be \$1,493,200. This amount of the cost should be allocated amongst the Southern Pacific Company, the Cities of Glendale and Los Angeles and the County of Los Angeles. In making an allocation of these costs we have in mind the contention of the City of Los Angeles on brief that the proposed grade separation would be entirely within the City of Glendale and that that City, therefore, should bear the

larger allocation so far as the municipal entities are concerned. Nevertheless, the evidence in this case shows that the westerly approach to the underpass will be in the City of Los Angeles and further that all of the traffic using this underpass either goes to or from the City of Los Angeles. In addition, one of the spur tracks which is directly involved is now within the City of Los Angeles. We likewise have in mind the position of the Chairman of the Board of Supervisors of the County of Los Angeles to the effect that the County would probably contribute to the cost. Therefore, in view of all of the evidence in this case and considering the positions of the respective parties hereto, we hereby find that, of the allocable cost of \$1,493,200, the Southern Pacific Company should bear 50 percent, or \$746,000, the County of Los Angeles 25 per cent, or \$373,300, and the Cities of Glendale and Los Angeles $12\frac{1}{2}$ per cent each, or \$186,650 apiece.

ORDER [797]

Application as above entitled having been filed, public hearings having been held thereon, and the Commission being fully advised in the premises,

It is ordered that the City of Glendale be authorized and it hereby is directed to separate the grades of Los Felix Road and the tracks of the Southern Pacific Company in the manner and at the location more particularly described in the foregoing opinion and substantially in accordance with the plan introduced in this proceeding, subject to the following conditions:

1. Of the total cost of the proposed structure, as set out in the foregoing opinion which is estimated to be \$1,493,200, fifty per cent (50%) shall be borne by the Southern Pacific Company, twenty-five per cent (25%) by the County of Los Angeles, twelve and one-half per cent ($12\frac{1}{2}\%$) by the City of Glendale, and twelve and one-half per cent ($12\frac{1}{2}\%$) by the City of Los Angeles.
2. Upon completion of the construction of said grade separation, the cost of maintaining those portions of the separation, which for the purpose of this decision

shall be referred to as the superstructure and be deemed to be everything above the bridge seats, shall be borne by the Southern Pacific Company. The remainder of the maintenance of the grade separation structure shall be borne by applicant.

3. The City of Glendale shall prepare detail plans and specifications for the construction of the grade separation, as referred to above, to carry Los Feliz Road under the tracks of Southern Pacific Company in the City of Glendale, the City of Glendale to submit said plans and specifications to the other interested parties and to the Commission for its approval within one hundred and twenty (120) days from the date hereof. Should they fail to agree on the plans, such disagreement shall be reported to the Commission, whereupon an appropriate order will be entered.

4. The City of Glendale shall undertake the construction of the separation referred to herein and upon receiving the approval of the Commission of the plans to be submitted, shall begin construction of the separation and shall be responsible for its completion.

5. Upon completion of the various phases of this project as the monies become payable and upon the presentation of proper bills therefor, the County of Los Angeles, the City of Los Angeles, and the Southern Pacific Company shall pay to the City of Glendale the costs apportioned to said agencies by this order.

6. The grade separation structure shall be constructed with clearances conforming to the provisions of General Order No. 26-D of this Commission.

7. The construction herein ordered shall be commenced within one year and completed within two years after the date hereof, unless further time is granted by subsequent order.

[798]

8. Within thirty (30) days thereafter, applicant shall notify this Commission in writing of the completion of the construction of said grade separation and of its compliance with the conditions hereof.

The effective date of this order shall be twenty (20) days after the date hereof.

Dated at San Francisco, California, this 30th day of June, 1952.

MITTELSTAEDT, HULB, POTTER, MITCHELL,
Commissioners.

COMMISSIONER JUSTUS F. CRAEMER, being necessarily absent, did not participate in the disposition of this proceeding.

APPENDIX B

DECISION NO. 47597

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

APPLICATION No. 32385

In the Matter of the Application of the CITY OF GLENDALE, a municipal corporation, for an order or orders authorizing and requiring the construction of a grade separation of the crossing of Los Feliz Road and the railroad of the SOUTHERN PACIFIC COMPANY, designating the portions of the work to be done respectively by said City, THE CITY OF LOS ANGELES and said railroad corporation, and allocating the cost thereof among said Cities and said railroad corporation.

CASE No. 5327

In the Matter of the Investigation on the Commission's own motion as to the necessity of effecting a grade separation between the tracks of the Southern Pacific Company and Los Feliz Boulevard in the cities of Los Angeles and Glendale, County of Los Angeles, State of California, and the division among the affected parties of the cost incident to such separation.

ORDER DENYING REHEARING AND MODIFYING DECISION

Southern Pacific Company having filed its petition for rehearing respecting Decision No. 47420, rendered herein,

the Commission having considered said petition and being of the opinion that no cause has been shown for granting the same,

It is ORDERED that said petition for rehearing be and the same is hereby denied.

Decision No. 47420 is hereby modified by substituting "spur track" for "yard track" on line 11 at page 2, thereof, and by substituting "746,600" for "\$746,000" on line 26 at page 15 of said decision.

Dated, San Francisco, California, this 19th day of August, 1952.

R. E. MITTELSTAEDT,
President.

JUSTUS F. CRAEMER,
HAROLD P. HULS,
PETER E. MITCHELL,
Commissioners.

Commissioner Kenneth Potter, being necessarily absent, did not participate in the disposition of this proceeding.

APPENDIX C

SUPREME COURT OF THE STATE OF CALIFORNIA
San Francisco, March 9, 1953

In Bank. S F 18704

SOUTHERN PACIFIC COMPANY

v.

PUBLIC UTILITIES COMMISSION

Petition for writ of review denied. Edmonds, J., and Schauer, J., are of the opinion that the petition should be granted.